

# EXHIBIT

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# EXHIBIT

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1  
2       IN THE UNITED STATES DISTRICT COURT  
3           FOR THE DISTRICT OF DELAWARE  
4       - - -  
5

6       IN RE: ADAMS GOLF, INC. :  
7           SECURITIES LITIGATION   :  
8

9                   ORAL DEPOSITION  
10                  OF

11               EDWARD NECARSULMER, III  
12               Monday, August 7, 2006  
13       - - -

14       Oral deposition of EDWARD NECARSULMER,  
15       III, held at the offices of SIMPSON THACHER &  
16       BARTLETT, LLP, 425 Lexington Avenue, New York,  
17       New York, commencing at 12:08 p.m., reported  
18       by Pamela Harrison, RMR, CRR, CSR and Notary  
19       Public.  
20       - - -  
21  
22

23       RSA/VERITEXT COURT REPORTING COMPANY  
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## EDWARD NECARSULMER, III

MR. LEWIS: The stipulations that  
 we have been proceeding under, as I  
 understand it, are waiving, sealing,  
 certification, and filing of the  
 transcript, and otherwise proceeding  
 under the federal rules.

MR. GLUCKOW: Give me those  
 again.

MR. LEWIS: Sealing.

MR. GLUCKOW: Right.

MR. LEWIS: Certification.

MR. GLUCKOW: Okay.

MR. LEWIS: And filing.

MR. GLUCKOW: Okay.

MR. LEWIS: Some of which  
 probably are already mooted by the  
 latest federal rules.

MR. GLUCKOW: Right.

MR. LEWIS: And I suppose you  
 want to reserve read and sign for  
 Mr. Necarsulmer?

MR. GLUCKOW: Exactly. Yes.

THE WITNESS: Perfect.

---

2 (Pages 2 to 5)

<p style="text-align: right;">Page 6</p> <p>1           EDWARD NECARSULMER, III 2           EDWARD NECARSULMER, III, after 3           having been duly sworn, was examined 4           and testified as follows: 5           --- 6           EXAMINATION 7           --- 8     BY MR. LEWIS: 9       Q. Would you state your name and 10      address for the record. 11      A. Edward Necarsulmer, III, P.O. 12      Box 1173, Quogue, Q-U-O-G-U-E, New York, 11959. 13      MR. LEWIS: As a preliminary, 14      since there is a simultaneous 15      deposition going on in this case in 16      Houston today, Mr. Collins suggested to 17      me that I pick up with numbering today 18      at 320, leaving a gap between the end 19      of the last deposition and his, which 20      might result in a few blank numbers but 21      will keep us from having two exhibits 22      with the same number. 23      So I'm going to pick up at 320, 24      and I'm just going to mark for the 25      record as Exhibit 320 a document -- a</p>	<p style="text-align: right;">Page 8</p> <p>1           EDWARD NECARSULMER, III 2           MR. KANE: I can get it to you 3           during the break. It was sent to 4           Mr. Collins. 5           MR. LEWIS: Okay. 6     BY MR. LEWIS: 7       Q. Mr. Necarsulmer, my name is Don 8       Lewis. I represent the plaintiffs in this 9       action, and I'm going to be asking you some 10      questions this afternoon. If I drop my voice, 11      garble my words, let me know and I'll have the 12      question read back to you. If I ask the 13      question in an incomprehensible way to you, let 14      me know and I'll reframe the question for you. 15      A. Fine. 16      Q. How did you come to be retained 17      in this litigation? 18      A. I have worked -- I have done 19      some prior work with the law firm, Simpson 20      Thacher. 21      Q. Was that in the AMF Bowling 22      litigation? 23      A. Correct. 24      Q. Have you done other work as an 25      expert witness for Simpson Thacher?</p>
<p style="text-align: right;">Page 7</p> <p>1           EDWARD NECARSULMER, III 2      letter from Ted McEvoy to Todd Collins, 3      enclosing documents NECARS 1 through 4      29. 5      (Whereupon, a document was 6      marked, for identification purposes, as 7      Exhibit 320.) 8      MR. LEWIS: I guess my question 9      really is to Mr. Gluckow. Has there 10      been any other production of documents 11      from this witness that you are aware 12      of? 13      MR. GLUCKOW: Yes, there was a 14      subsequent production I think just on 15      the heels of the rebuttal report. 16      MR. KANE: Yes. 17      MR. GLUCKOW: Ryan probably has 18      the Bates numbers. I think it was just 19      a half dozen more pages. We can 20      probably get a copy for you, but I 21      think it's NECARS 30 through 33 or 35 22      or 37, or something like that. 23      MR. LEWIS: Somehow that seems to 24      have slipped through the cracks. If I 25      could see a copy of that before.</p>	<p style="text-align: right;">Page 9</p> <p>1           EDWARD NECARSULMER, III 2      A. I did work as a consulting 3      expert in a confidential matter prior to the 4      AMF. 5      Q. A confidential matter involving 6      due diligence? 7      A. Correct. Similar situation, 8      just never -- it was settled. 9      Q. Is there some reason that you 10      can't disclose the name of the client in that 11      matter? 12      MR. GLUCKOW: Why don't I take it 13      up with Mr. Necarsulmer. It may well 14      be that it was a confidential 15      engagement. My understanding is that 16      there was no report and that it was 17      just a consulting behind the scenes. 18      MR. LEWIS: All right. 19     BY MR. LEWIS: 20      Q. Is that your understanding as 21      well? 22      A. That's correct. 23      Q. So have you generated expert 24      witness reports for the Simpson Thacher firm 25      before accepting the AMF litigation?</p>

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Page 12

1           EDWARD NECARSULMER, III  
 2       A. No.

3       MR. GLUCKOW: Object -- you've  
 4       got to give me a chance just to object  
 5       in general before you give your answer.

6       Objection to the form of the  
 7       question.

8       You can answer.

9       THE WITNESS: The answer is no.

10      (Whereupon, documents were  
 11     marked, for identification purposes, as  
 12     Exhibit 321 and Exhibit 322.)

13 BY MR. LEWIS:

14      Q. Let me hand you what I'm marking  
 15     as Exhibits 321 and 322. 321 is a copy of your  
 16     expert report, and 322 is a copy of your  
 17     rebuttal report.

18      Am I correct that Exhibit 321  
 19     is a copy of the expert report you rendered in  
 20     this litigation?

21      A. Yes.

22      Q. And that 322 is a copy of your  
 23     rebuttal report?

24      A. Yes.

25      Q. When were you retained in this

1           EDWARD NECARSULMER, III  
 2       contact with Simpson Thacher in this litigation  
 3       and the time you generated your first expert  
 4       report, did you participate in any meetings with  
 5       respect to the report?

6       MR. GLUCKOW: Objection to the  
 7       form.

8       You can answer.

9       THE WITNESS: Yes; however, it  
 10      was really after the report was  
 11      written.

12 BY MR. LEWIS:

13      Q. Okay. And where was the  
 14      meeting?

15      A. We did a conference call, a  
 16      web-based conference call.

17      Q. Was that a type of call in which  
 18      you can see each other?

19      A. No, it was a type of call in  
 20      which you could see a document.

21      Q. And had you completed the final  
 22      touches on your expert report by the time that  
 23      web-based conference call was held?

24      MR. GLUCKOW: Objection to the  
 25      form.

Page 11

Page 13

1           EDWARD NECARSULMER, III  
 2       litigation, approximately?

3      A. I believe in April.

4      Q. Were you given any specific  
 5       instructions with respect to putting together an  
 6       expert report in this case?

7      A. No.

8      Q. What kind of guidance were you  
 9       given, if any?

10     A. Basically to review the  
 11     material, make my own determination as to how I  
 12     felt about the issue to which I was going to  
 13     opine. Really nothing further than that.

14     Q. When did you start to review the  
 15     materials and to make your determination as to  
 16     what you thought about them?

17     A. I think -- I'm not a hundred  
 18     percent certain that I remember the dates I  
 19     received them, but as soon as I began to get the  
 20     materials, which I believe was probably in  
 21     April, also.

22     Q. Did anyone assist you in  
 23     drafting either of your reports?

24     A. No.

25     Q. Between the time of your initial

1           EDWARD NECARSULMER, III  
 2       You can answer.

3       THE WITNESS: Yes.

4 BY MR. LEWIS:

5      Q. Who participated in that call?

6      A. Mr. Gluckow and perhaps one of  
 7       his associates and a firm called Cornerstone,  
 8       and I don't actually recall if anyone from Akin  
 9       Gump was on the call or not. I think they were  
 10      not on the call, so I would limit -- rephrase  
 11      the answer to someone from Cornerstone and from  
 12      Simpson Thacher.

13      (Whereupon, a document was  
 14      marked, for identification purposes, as  
 15      Exhibit 323.)

16 BY MR. LEWIS:

17      Q. I'll show you next what has been  
 18      marked as Exhibit 323, which appears to be an  
 19      e-mail from Mr. Gluckow to yourself, dated April  
 20      28, 2006.

21      Did you receive some version of  
 22      that e-mail from Mr. Gluckow?

23      A. I did.

24      Q. The first line of the e-mail  
 25      reads: "It looks like the person from Lehman

4 (Pages 10 to 13)

Page 14

1           EDWARD NECARSULMER, III  
 2 will not be able to make a meeting on May 8th  
 3 (and in fact will be out that entire week)."

4           What do you understand the  
 5 reference to a meeting on May 8th to be?

6           A. It was a meeting to meet with  
 7 the ultimate client and just to have them look  
 8 me over and shake my hand.

9           Q. Was that meeting to occur before  
 10 you've completed your expert witness report?

11          A. Yes.

12          Q. Would it be fair to say your  
 13 expert witness report was completed on the date  
 14 you signed it?

15          A. Correct.

16          Q. Did you ever attend a meeting  
 17 with a person from Lehman to make the  
 18 determination you referred to?

19          A. Yes.

20          Q. And when did that take place?

21          A. I don't recall the date.

22          Q. Sometime in the month of May?

23          A. Yes.

24          Q. Was the person from Cornerstone  
 25 who participated in the web-based conference

Page 14

Page 16

1           EDWARD NECARSULMER, III  
 2 Q. At the time the web-based call  
 3 took place, was your expert report in exactly  
 4 the same form as it now appears --

5          A. Yes.

6          Q. -- as Exhibit 321?

7          A. Yes.

8          Q. Including your signature?

9          A. No.

10         Q. So when was the report actually  
 11 finished but for your signature?

12         A. Either July 10th or July 11th, I  
 13 entered the date of the signature line.

14         Q. And the web-based conference  
 15 call took place a month earlier?

16         A. No. Maybe a week earlier, that  
 17 sort of a time period.

18         Q. Between the time of your --  
 19 between the date July 12, on which your first  
 20 report was signed, and the date of July 26th,  
 21 2006, on which your rebuttal report was signed,  
 22 did you have any meetings with anyone concerning  
 23 your rebuttal report?

24         A. We had a similar conference call  
 25 on the rebuttal report.

Page 15

Page 17

1           EDWARD NECARSULMER, III  
 2 call someone named Adel Turki?

3          A. Yes.

4          Q. Am I mispronouncing his name?

5           MR. GLUCKOW: It's Adel.

6           MR. LEWIS: Adel.

7         BY MR. LEWIS:

8          Q. Who was Mr. Turki?

9          A. He is the -- I believe he is the  
 10 manager of the project, the expert project,  
 11 working with Simpson Thacher.

12          Q. Did you have an understanding as  
 13 to why he was participating in a web-based  
 14 conference call that dealt with your expert  
 15 witness report?

16          A. To the best of my knowledge, he  
 17 was coordinating all the expert material and he  
 18 also was the facilitator.

19          Q. Did Mr. Turki provide you with  
 20 any thoughts regarding your report?

21          A. I don't believe he did.

22          Q. Did anyone from Cornerstone  
 23 supply you with any materials relating to your  
 24 project before you completed your report?

25          A. No.

1           EDWARD NECARSULMER, III

2          Q. Can you recall any of the  
 3 participants in the similar conference call?

4          A. I think it was a -- with the  
 5 exception of the associates from Cornerstone  
 6 whose name I just don't know, it would have been  
 7 the same cast of characters as the first  
 8 conference call.

9          Q. And do you believe there was  
 10 someone from Akin Gump on that second call?

11          A. Yes.

12          Q. And who was it?

13          A. I don't know.

14           MR. LEWIS: Off the record.  
 15           (A discussion was held off the  
 16 record.)

17         BY MR. LEWIS:

18          Q. How long did it take you to  
 19 write your initial expert report?

20           MR. GLUCKOW: You mean --

21           MR. LEWIS: Drafting terms.

22           MR. GLUCKOW: So you're not  
 23 including all the time he spent  
 24 reviewing materials, you are just  
 25 talking about sitting at the computer

5 (Pages 14 to 17)

<p>1                   EDWARD NECARSULMER, III 2 drafting? 3                   MR. LEWIS: Drafting. 4                   THE WITNESS: I mean, I would 5 estimate between, you know, four and 6 six hours of actual time, but my method 7 of working is I go back at this 8 thing -- you know, I'll write the 9 report, I'll go back at it, I'll think 10 about it, I might move things around a 11 little bit, so it may have been a 12 longer period than that, but, you know. 13 BY MR. LEWIS: 14                  Q. How long had you spent reviewing 15 the materials before you sat down to write the 16 report? 17                  A. I'm going to estimate 40-plus 18 hours. 19                  Q. Can you describe as you recall 20 it the process you went through in reviewing the 21 materials? 22                  MR. GLUCKOW: Objection to the 23 form. 24                  You can answer. 25                  THE WITNESS: I usually do it box</p>	<p>1                   EDWARD NECARSULMER, III 2                  A. It's -- I will always -- I've 3 been under the impression from when I've worked 4 on these cases that that's not -- that drafts 5 and notes are not the best things for expert 6 witnesses to do. 7                  Q. Did you receive instructions to 8 that effect in this case? 9                  A. No, no instructions in this 10 particular case, that's just my understanding of 11 the responsibilities. 12                  Q. When you actually wrote up your 13 report, did you use the AMF Bowling report as a 14 template -- 15                  A. Yes. 16                  Q. -- for the report that you were 17 writing? 18                  A. Yes. 19                  MR. LEWIS: Let me just mark that 20 as Exhibit 324. 21                  (Whereupon, a document was 22 marked, for identification purposes, as 23 Exhibit 324.) 24 BY MR. LEWIS: 25                  Q. Do you recognize this as a copy</p>
<p>1                   EDWARD NECARSULMER, III 2 by box, and what I'll do is I'll try to 3 order the boxes, actually just in 4 physical stack, as to the things that I 5 want to look at again or want to, you 6 know, give more scrutiny to. But I 7 just go through things, documents one 8 after another, and I try to do it for 9 as long a period as I can and still 10 remain able to retain the material. 11 BY MR. LEWIS: 12                  Q. As you were doing that, did you 13 make notes? 14                  A. I did not. 15                  Q. Did you make notations on 16 Post-its? 17                  A. No. 18                  Q. You just segregated the 19 materials that you wanted to look back at? 20                  A. Yes. The only indication I 21 would ever make is I would make a checkmark to 22 show that I've read it, and sometimes I put a 23 date on it to show that I've read it. 24                  Q. Is there some reason that you 25 didn't make notes on materials like that?</p>	<p>1                   EDWARD NECARSULMER, III 2 of an expert witness report that you generated 3 in the AMF case? 4                  A. Yes. 5                  Q. I'll try to put the questions 6 together for speed, but we'll break them apart 7 if it becomes a problem. 8                  In drafting either the expert 9 report or the rebuttal expert report, did you 10 create any drafts? 11                  A. No. 12                  Q. Before you actually -- would it 13 be fair to say that before you actually signed 14 either of the reports, you participated in one 15 of these web-based conference calls in which the 16 text of the report was shown to your -- to the 17 attorneys who retained you before you actually 18 signed the document? 19                  MR. GLUCKOW: Can I just have 20 that one read back? I missed the 21 beginning. 22                  (The court reporter read the 23 record as follows: 24                  "QUESTION: Before you actually 25 -- would it be fair to say that before</p>

Page 22

1           EDWARD NECARSULMER, III  
 2 you actually signed either of the  
 3 reports, you participated in one of  
 4 these web-based conference calls in  
 5 which the text of the report was shown  
 6 to your -- to the attorneys who  
 7 retained you before you actually signed  
 8 the document?"  
 9           MR. GLUCKOW: You can answer.  
 10          THE WITNESS: Yes.

BY MR. LEWIS:

12          Q. Were any changes made to either  
 13 of the reports after the web-based conference  
 14 calls?

15          A. The only change -- and it's true  
 16 of both reports -- were one of punctuation and  
 17 one of numbering. I can't tell you on which  
 18 report was which.

19          Q. Fair enough.

20          But no substantive changes?

21          A. Nothing of substance.

22          Q. So after the punctuation or  
 23 numbering changes were made, you edited the  
 24 document in whatever word processing system you  
 25 had, finalized it, and never had a different

Page 24

1           EDWARD NECARSULMER, III  
 2 THE WITNESS: No.  
 3           MR. LEWIS: -- of any source.

BY MR. LEWIS:

5           Q. Just -- I'm not trying to be  
 6 vague here. Did you receive any information  
 7 from Lehman Brothers --

8          A. No.

9          Q. -- regarding its due diligence  
 10 process other than what you saw in the  
 11 transcripts, court filings, exhibits?

12          A. The answer is no.

13          Q. And did you receive any  
 14 information from your -- from the counsel who  
 15 retained you, Simpson Thacher, about the due  
 16 diligence process or their views as to what had  
 17 happened in due diligence?

18          A. No.

19          MR. GLUCKOW: Other than what's  
 20 set forth in the exhibit.

21          THE WITNESS: I thought that was  
 22 the question.

BY MR. LEWIS:

24          Q. I'm sorry, I have a tendency to  
 25 try to sharpen at the end and it sometimes will

Page 23

1           EDWARD NECARSULMER, III  
 2 hard copy draft?

3          A. No. I mean, that is correct.

4          Q. You never -- you had it only on  
 5 your screen before the final version was printed  
 6 out?

7          A. That is correct.

8          Q. And approximately how many hours  
 9 in total have you devoted to this litigation so  
 10 far?

11          A. I would have to look in my time  
 12 book, but right up around 60 before today.

13          Q. In your expert report numbered  
 14 321 you have listed as Exhibit B Materials  
 15 Considered. Can you explain what the heading  
 16 Materials Considered means to you?

17          A. Basically all the documents  
 18 involved in the case that I reviewed.

19          Q. In rendering your opinion, did  
 20 you consider any information from sources other  
 21 than the items that are listed in Exhibit B to  
 22 your expert report?

23          MR. GLUCKOW: You mean specific  
 24 to this litigation?

25          MR. LEWIS: Specific -- well --

Page 25

1           EDWARD NECARSULMER, III  
 2 change the direction of the question, so you  
 3 will probably be better served if you wait for  
 4 me, and I'll try to wait for you and try not to  
 5 overspeak you on these questions.

6          Did you receive anything in the  
 7 nature of deposition summaries from anyone  
 8 related to this litigation?

9          A. I -- no.

10         Q. Did you receive any legal  
 11 analysis from counsel in this litigation other  
 12 than what may be reflected in Exhibit B?

13         A. No.

14         Q. Did anyone from Lehman Brothers  
 15 discuss the due diligence process with you at  
 16 all?

17         A. No.

18         Q. Have you, as an expert witness,  
 19 heard the term work product as relating to  
 20 lawyers?

21         A. Yes.

22         Q. Did you receive any work product  
 23 from your counsel in connection with your work  
 24 on the Adams Golf engagement?

25         A. No.

7 (Pages 22 to 25)

<p style="text-align: right;">Page 26</p> <p>1                   EDWARD NECARSULMER, III      2       Q. Let me turn to the report, 321.      3     Just some basic things. I see that you have      4     listed your hourly rate as \$600 per hour. Is      5     that the current rate?      6       A. That is accurate.      7       Q. Am I correct that in 2004 it was      8     \$450, back in the AMF case?      9       A. That's correct.      10      Q. When did the rate change?      11      A. In 2005.      12      Q. What was the circumstance of      13     that?      14       A. I was discussing being retained      15     in another case and discussed the going rate and      16     was informed that \$600 was a fair rate.      17       Q. In Paragraph 3 of the report, in      18     the category of Prior Testimony, you write: "I      19     am also currently retained as an expert in a      20     matter before the United States District Court      21     in the Northern District of Texas."      22       What is that matter, in general      23     terms?      24       A. It is a -- it's a similar type      25     of case. The company is called Flowserv, and</p>	<p style="text-align: right;">Page 28</p> <p>1                   EDWARD NECARSULMER, III      2       A. I have not.      3       Q. Have you -- as a technical      4     matter, have you yet been found by any court      5     either qualified or unqualified to render an      6     expert witness opinion on any subject?      7       MR. GLUCKOW: Objection to the      8     form.      9       You can answer.      10      THE WITNESS: No.      11      BY MR. LEWIS:      12      Q. Have you ever been retained as      13     an expert on matters of disclosure?      14       MR. GLUCKOW: Objection to the      15     form.      16       You can answer.      17       THE WITNESS: Not specifically.      18     The assignment is usually phrased as      19     due diligence; however, you tend to get      20     asked whether the due diligence led to      21     the proper disclosure.      22      BY MR. LEWIS:      23      Q. Have you ever, other than in      24     this present litigation, included an opinion in      25     one of your reports on the subject of whether</p>
<p style="text-align: right;">Page 27</p> <p>1                   EDWARD NECARSULMER, III      2     it is plaintiffs coming after the company and      3     underwriter defendants based on a number of      4     issues which due diligence is one.      5       Q. And what underwriters have      6     retained you in that case?      7       A. The --      8       MR. GLUCKOW: Objection to the      9     form. It assumes facts not in      10     evidence.      11       MR. LEWIS: I'll withdraw the      12     question.      13      BY MR. LEWIS:      14      Q. Who has retained you in that      15     case?      16       A. The firm of Jenkens &amp; Gilchrist.      17       Q. And what underwriters are the      18     defendants in that case whose due diligence,      19     among other things, you are considering?      20       A. CSFB and Banc of America      21     Securities.      22       Q. Have you yet rendered any      23     opinions in that case?      24       A. I have not.      25       Q. Have you testified in that case?</p>	<p style="text-align: right;">Page 29</p> <p>1                   EDWARD NECARSULMER, III      2     something should have been disclosed as a result      3     of due diligence?      4       MR. GLUCKOW: Objection to the      5     form.      6       I think you've already      7     established the only other report is      8     the Exhibit 324.      9       But you can answer.      10      THE WITNESS: No.      11      BY MR. LEWIS:      12      Q. I note in your description of      13     your experience that both presently and between      14     March of '98 and May of 2000 you have acted as a      15     consultant to the financial services industry.      16     Is that fair?      17       MR. GLUCKOW: Just for the record      18     here, you are looking at what now?      19       MR. LEWIS: I'm looking at      20     Exhibit A to Court Exhibit 321, and      21     this is the part that includes      22     Mr. Necarsulmer's CV or biography.      23      BY MR. LEWIS:      24      Q. Am I correct that between March      25     of 1998 and May 2000 you were a consultant to</p>

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1                   EDWARD NECARSULMER, III  
 2 the financial services industry?

3                   A. Yes.

4                   Q. And also between May of 2002 and  
 5 the present you have been a consultant to that  
 6 industry --

7                   A. That is correct.

8                   Q. -- is that fair?

9                   In the course of your work as a  
 10 consultant, have you been asked by any  
 11 underwriters to render them an opinion outside  
 12 of court on whether something they did in due  
 13 diligence was appropriate or inappropriate?

14                  A. No. The scope of my work, just  
 15 if it's useful, the scope of my work has  
 16 traditionally been -- and I don't do much of it  
 17 anymore -- has been an operating practice,  
 18 should we -- how do we organize a sales group,  
 19 how do we organize a research group, will this  
 20 client's -- things like that.

21                  Q. So in what -- I'll try to ask  
 22 this fairly.

23                  In the course of your career in  
 24 the financial industry, leaving aside your  
 25 expert witness work of the last several years,

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1                   EDWARD NECARSULMER, III  
 2 case or a Ferris Baker Watts did, they were  
 3 comanagers. So the primary responsibility is  
 4 based on the -- is in the arms of the  
 5 book-running manager.

6                   Q. So were there times while you  
 7 were working in the industry, say, on the  
 8 commitment committee that you had to send your  
 9 investment banking team back to do more due  
 10 diligence on a subject?

11                  A. Absolutely.

12                  Q. Have you ever authored any  
 13 publications with respect to due diligence  
 14 investigations?

15                  MR. GLUCKOW: Object to the form.  
 16 You can answer.

17                  THE WITNESS: Not external, not  
 18 things for general use. I certainly  
 19 was part of, in firms, making sure that  
 20 our standard due diligence procedure,  
 21 adding and editing to that, but nothing  
 22 for external use.

23                  BY MR. LEWIS:

24                  Q. You helped create standard due  
 25 diligence procedures for one or more firms?

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1                   EDWARD NECARSULMER, III  
 2 have you been called upon to evaluate due  
 3 diligence investigations?

4                   A. Absolutely.

5                   Q. And when did that -- when was  
 6 that first the case in your practice?

7                   A. Through my whole career, I  
 8 mean. Either as practitioner or running a deal,  
 9 but most importantly as a commitment committee  
 10 chair or member, which I did for a number of  
 11 years, the heart of the work was evaluating your  
 12 own investment banker's due diligence or if you  
 13 were comanager, the due diligence done by  
 14 whoever was the book-running manager, so that  
 15 was a significant part of certainly the last 20  
 16 years of my career in banking.

17                  Q. Just by way of terminology, you  
 18 used the phrase book-running manager. Can you  
 19 explain what you mean by that?

20                  A. In virtually all offerings one  
 21 manager -- one of the underwriters -- one of the  
 22 managing underwriters is designated as the book  
 23 runner and he will be the responsible party.  
 24 Like Lehman was in this situation versus what a  
 25 Banc of America -- Nations Banc I guess in this

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1                   EDWARD NECARSULMER, III

2                   A. Yes.

3                   Q. Which firms were they?

4                   A. For CJ Lawrence, which then  
 5 became Morgan Grenfell and then became Deutsche  
 6 Bank.

7                   And Wasserstein Perella, I  
 8 certainly didn't create it, but as head of the  
 9 equity area I altered it to meet my own  
 10 practices and standards.

11                  Q. In the course of your work in  
 12 the financial industry, did you ever receive any  
 13 legal training?

14                  A. None.

15                  Q. Did you ever teach due diligence?

16                  A. Let me make sure I phrase this  
 17 properly.

18                  Particularly in my Deutsche  
 19 Bank life, we had a significant number of  
 20 training classes, whether they were for MBAs  
 21 or for people from other parts of the world,  
 22 and I would do -- I would usually run the  
 23 equity capital markets classes. Due diligence  
 24 was certainly a part of that, would be a  
 25 subject underneath the general heading of

9 (Pages 30 to 33)

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1 EDWARD NECARSULMER, III  
 2 investment banking or equity capital markets  
 3 and that would be my responsibility.

4 Q. As best you can recall it,  
 5 sitting here today, what in general did you --  
 6 by way of materials did you present to your  
 7 instructees about due diligence?

8 MR. GLUCKOW: You are asking him  
 9 to recall the sum and substance of the  
 10 lectures?

11 BY MR. LEWIS:

12 Q. Not the sum and substance, but  
 13 the nature of the materials that were given.  
 14 Were they case studies in due diligence, were  
 15 they outlines of or checklists, were they  
 16 discussions of cases, discussions of industry  
 17 standards? What, in general, did you present  
 18 when you were teaching due diligence?

19 MR. GLUCKOW: Objection to the  
 20 form.

21 You can answer.

22 THE WITNESS: I would usually  
 23 include the most recent checklist that  
 24 the firm -- the appropriate firm was  
 25 using, and I might have some discussion

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1 EDWARD NECARSULMER, III  
 2 the registration statement is the issuer's,  
 3 the underwriting team," dash, "including its  
 4 counsel is also responsible for the  
 5 completeness, materiality, and veracity of  
 6 this information."

7 Why do you say that the  
 8 registration statement is the issuer's?

9 A. It's a fact. They file it, they  
 10 are the only ones who could make changes to it,  
 11 respond to comments.

12 Q. Okay. Have you ever heard  
 13 anyone express the view that as a matter of law  
 14 under the 1933 Act that both the underwriters  
 15 and the issuer are equally legally responsible  
 16 for the content of the document subject to the  
 17 due diligence defense?

18 MR. GLUCKOW: Objection to the  
 19 form. Calls for a legal conclusion.

20 You can answer.

21 THE WITNESS: I do understand  
 22 that. I guess my response would be to  
 23 the first -- back to the first part of  
 24 what the question is, as a matter of  
 25 business practice, the registration

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1 EDWARD NECARSULMER, III  
 2 of how industry standards might have  
 3 changed or might be at the moment, but  
 4 I'm really not -- can't be any more  
 5 specific than that.

6 BY MR. LEWIS:

7 Q. Do you recall whether the  
 8 checklist was annotated with legal authorities?

9 MR. GLUCKOW: Objection to the  
 10 form.

11 You can answer.

12 THE WITNESS: No.

13 BY MR. LEWIS:

14 Q. Since I didn't ask the question  
 15 very well, I'm not sure whether you don't recall  
 16 whether it was, or recall that it wasn't. To  
 17 the best of your knowledge, did you provide your  
 18 instructees with a checklist that was keyed to  
 19 cases --

20 A. No.

21 Q. -- that established  
 22 requirements?

23 I ask you to look to Paragraph  
 24 B on Page 2 of Exhibit 321. In the middle of  
 25 the paragraph you use the phrase: "Although

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1 EDWARD NECARSULMER, III  
 2 statement, and certainly in the many  
 3 deals that I've worked on, is the  
 4 issuer's document. Issuer's counsel,  
 5 you know, is the first name on the  
 6 agents for service. It's just the way  
 7 things are done.

8 BY MR. LEWIS:

9 Q. If you would just look for a  
 10 second and maybe keep by you the report from the  
 11 AMF litigation, Exhibit 324.

12 If you look to the same  
 13 Paragraph B in that report, you will see there  
 14 is no -- unless I miss it -- statement in that  
 15 paragraph to the effect that the registration  
 16 statement is the issuer's.

17 MR. GLUCKOW: You mean those  
 18 words are not in Exhibit 324?

19 MR. LEWIS: They are not on it.

20 Not that I see.

21 MR. GLUCKOW: The document speaks  
 22 for itself.

23 MR. LEWIS: Correct me if it's  
 24 somewhere else.

25 MR. GLUCKOW: Is there a

10 (Pages 34 to 37)

<p>1           EDWARD NECARSULMER, III 2       question? 3 BY MR. LEWIS: 4       Q. Well, was there some reason that 5 you added that reference -- strike that. 6       Is there some reason that in 7 writing your report in this litigation you 8 felt it useful to include a reference that the 9 registration statement is the issuer's? 10      A. There's no particular reason. 11     These are conclusions that I drew from reading 12 the material and thought that they were 13 relevant. 14      Q. Getting back to 321 at Paragraph 15 6 on Page 3, describing the due diligence 16 process in this case, you write: "The process 17 was enhanced by the book-running firm's 18 commitment process. A complete memo was 19 prepared and presented to a group of senior firm 20 members. This group further reviewed and 21 validated the deal team's due diligence 22 efforts." 23      MR. GLUCKOW: Excuse me. If you 24 wouldn't mind, I think you lost the 25 witness in terms of where you were</p>	<p>1           EDWARD NECARSULMER, III 2       MR. LEWIS: Right. 3 BY MR. LEWIS: 4       Q. Exhibit 74 is the complete memo 5 that you referred to in Paragraph 6? 6       A. To the best of my recollection. 7       Q. Did you receive any information 8 from Lehman about the commitment process other 9 than appears in the documents that are listed in 10 your report? 11      A. No. 12      Q. Did you read Exhibit 74 from 13 cover to cover in the process of your work on 14 this case? 15      A. Yes. 16      Q. Did you find someplace in 17 Exhibit 74 where there is reference to either 18 potential gray marketing or to potential Costco 19 distribution? 20      A. Not that I recall. 21      Q. Do you have any reason to 22 believe that either gray marketing or Costco 23 distribution were mentioned orally to the 24 commitment committee, although those terms don't 25 appear in the memo?</p>
<p>1           EDWARD NECARSULMER, III 2 reading from. Would you mind going 3 back and redirecting us to where you 4 are. 5       MR. LEWIS: We are on Page 3, 6 Paragraph 6. 7       MR. GLUCKOW: And we are on 321; 8 correct? 9       MR. LEWIS: Right, 321. 10 BY MR. LEWIS: 11      Q. "The process was enhanced by the 12 book-running firm's commitment process. A 13 complete memo was prepared and presented to a 14 group of senior firm members. This group 15 further reviewed and validated the deal team's 16 due diligence efforts." 17      When you wrote that, were you 18 referring to the commitment memo that appears 19 at Exhibit 74? 20      A. Yes. 21      MR. GLUCKOW: When you said -- 22 just for the record, I'm assuming your 23 question is referring to the complete 24 memo as opposed to the process referred 25 to in Paragraph 6?</p>	<p>1           EDWARD NECARSULMER, III 2       A. I wouldn't know. 3       Q. From your experience working in 4 the industry, would you expect that the 5 commitment committee would be provided with 6 facts at a commitment committee meeting that did 7 not appear in the memorandum that was being 8 presented to them? 9       MR. GLUCKOW: Objection. Calls 10 for speculation. 11      You can answer. 12      THE WITNESS: I just wasn't 13 there. Certainly, from a practice 14 matter, you might ask questions -- you 15 do ask questions; you frankly grill the 16 team -- the presenters. That's the 17 process. 18 BY MR. LEWIS: 19      Q. What is the purpose of a 20 commitment committee memorandum, as you 21 understand it? 22      A. It's really to generally 23 familiarize people who are not actively involved 24 with the transaction as to what they are going 25 to hear, the subject, and, maybe, hopefully --</p>

1                   EDWARD NECARSULMER, III  
 2 it doesn't always work this way -- they'll think  
 3 about it before they walk in the door.

4       Q. The "they" being the commitment  
 5 committee itself?

6       A. The commitment committee,  
 7 correct.

8       Q. Now, getting to Paragraph 7 of  
 9 your report, which includes a summary of your  
 10 opinions -- this is Paragraph 7, Summary, Page  
 11 4, the next page. Let me take this in pieces.

12      The first sentence reads:

13     "Based on my long industry experience and the  
 14 information presented to me, it is my opinion  
 15 that the underwriters of this offering  
 16 performed due diligence in line with normal  
 17 industry standards and practice."

18     Can you explain to me, sir,  
 19 what you mean by "in line with normal industry  
 20 standards and practice"?

21     A. The years of experience that I  
 22 had actually doing this leads me to believe --  
 23 leads me to think I understand, you know, what  
 24 is required and what is expected for the  
 25 process, and when I opine that it's in line with

1                   EDWARD NECARSULMER, III  
 2 was a period in the '70s when there was a huge  
 3 conglomeration of firms.

4       Actually, I did a fair amount  
 5 of due diligence where I was the guy who  
 6 actually went and visited the factory at that  
 7 point in my career.

8       Q. Opened the boxes?

9       A. Correct.

10      Q. Now, the next sentence of your  
 11 opinion, immediately following the one I read  
 12 previously, reads: "Their actions were  
 13 consistent with a standard of reasonableness as  
 14 I understand it, and were more than sufficient  
 15 to satisfy me as to their adequacy and  
 16 completeness."

17      Again, words are the heart of all  
 18 depositions, I guess. What do you mean by "a  
 19 standard of reasonableness as I understand it"?

20      A. As we've already established, I  
 21 have no legal training, but it's certainly my  
 22 business understanding or concept that the  
 23 underwriters are supposed to conduct reasonable  
 24 due diligence, and, again, in compliance with  
 25 what I've done in my own career, I've felt and

1                   EDWARD NECARSULMER, III  
 2 that, it means simply that, that I think they  
 3 complied with what I think is necessary to have  
 4 complete due diligence.

5       Q. Are the industry standards that  
 6 you refer to in your opinion something that is  
 7 written down in some industry publication or  
 8 guideline?

9       A. It's business practice.

10      Q. An actual business practice that  
 11 you have observed in your years of working in  
 12 the financial industry, correct?

13      A. Yes.

14      Q. That experience was gained at  
 15 the firms that are mentioned -- that you've  
 16 already mentioned in your testimony and also  
 17 Hallgarten, H-A-L-L-G-A-R-T-E-N, and Company?

18      A. Yes.

19      Q. Hallgarten and Company was at  
 20 one point Moseley and Hallgarten?

21      A. Actually, the opposite.

22      Hallgarten and Company was a firm of which there  
 23 were a great number. It was actually founded in  
 24 1850 and had a significant business but then  
 25 became part of Moseley and Hallgarten, and there

1                   EDWARD NECARSULMER, III  
 2 feel that this meets those standards -- that  
 3 their efforts meet those standards. Let me  
 4 phrase that better.

5       Q. The standard that you refer to  
 6 then in that sentence is a standard based on  
 7 your empirical observation and personal work in  
 8 the financial industry rather than anything that  
 9 is written down in text anywhere?

10      MR. GLUCKOW: Objection to the  
 11 form.

12      You can answer.

13      THE WITNESS: Yes.

14      BY MR. LEWIS:

15      Q. Have you been a member of any  
 16 industry committees or associations at which  
 17 representatives of underwriting firms sit down  
 18 to discuss principles of due diligence?

19      A. I've participated in numerous  
 20 industry panels and study groups and the like,  
 21 commented on rules, changing the department of  
 22 corporate financing's rules, et cetera. Due  
 23 diligence is certainly part of it, but I  
 24 couldn't cite you a time when I attended a  
 25 special seminar on due diligence, but I was an

1 EDWARD NECARSULMER, III  
 2 active participant in Securities Industry  
 3 Association, Investment Bankers Association,  
 4 NASD, Group of Corporate Finance, I did a lot of  
 5 that kind of thing, yes.

6 Q. You believe you've at least  
 7 heard people talk at such meetings, in such  
 8 context about due diligence?

9 A. I do.

10 Q. Have you read any publications  
 11 about due diligence?

12 MR. GLUCKOW: Ever?

13 MR. LEWIS: Ever.

14 THE WITNESS: Yes, but I can't  
 15 really recall -- I can't cite any, but  
 16 I know that I've done so.

17 BY MR. LEWIS:

18 Q. Do you recall anything you've  
 19 seen in writing about due diligence in the last  
 20 five years?

21 MR. GLUCKOW: Object to the form.

22 You can answer.

23 THE WITNESS: No.

24 BY MR. LEWIS:

25 Q. In the first sentence of this

1 EDWARD NECARSULMER, III  
 2 parts of this, were present at  
 3 meetings, so I would not use the word  
 4 -- I think the word you used was  
 5 advocated or --

6 BY MR. LEWIS:

7 Q. Delegated.

8 A. Delegated, I think to the extent  
 9 that it's industry standard to clearly delegate  
 10 the lead to the book-running manager, but I  
 11 think they performed in line with what I would  
 12 have expected.

13 Q. What were you referring to with  
 14 respect to the other underwriters keeping their  
 15 own files?

16 A. I have production from Nations  
 17 Banc; I've seen some of their work; I've seen  
 18 the fact that they participated in meetings.

19 Q. As part of the overall  
 20 Underwriter Defendants Document Production Pages  
 21 1 to 11636?

22 A. That's correct.

23 Q. Can you recall anything that  
 24 Nations Banc did with respect to an evaluation  
 25 of possible gray marketing or Costco

1 EDWARD NECARSULMER, III  
 2 summary you refer to the underwriters of this  
 3 offering having performed due diligence in line  
 4 with normal industry standards and practice.

5 Are you referring there to  
 6 Lehman Brothers rather than to Ferris Baker  
 7 Watts or Nations Banc?

8 A. I'm referring to all three  
 9 managers.

10 Q. Do you believe that the  
 11 underwriters other than Lehman Brothers  
 12 satisfied their due diligence by delegating that  
 13 function to Lehman which, in your view,  
 14 satisfactorily performed it?

15 MR. GLUCKOW: Objection to form.

16 Assumes facts not in evidence.

17 Mischaracterizes the testimony.

18 You can answer.

19 THE WITNESS: I don't believe  
 20 they -- look, the practical reality is  
 21 that the managing underwriter is  
 22 responsible for the process, but I  
 23 think there's ample reference to the  
 24 fact that the other firms kept their  
 25 own files, participated in various

1 EDWARD NECARSULMER, III  
 2 distribution of Adams clubs?

3 A. No.

4 Q. Can you recall anything that  
 5 Ferris Baker Watts did with respect to gray  
 6 marketing or possible Costco distribution of  
 7 Adams clubs?

8 A. No.

9 Q. Just to be clear in terms of  
 10 your reading, have you ever read case law  
 11 regarding the legal standards for due diligence?

12 MR. GLUCKOW: Object to the form.

13 You can answer.

14 THE WITNESS: Not that I recall.

15 BY MR. LEWIS:

16 Q. Have you heard of any cases,  
 17 legal cases, in the field of due diligence that  
 18 you consider to be important cases?

19 A. No.

20 Q. Have you ever heard of a  
 21 decision in a case called Escott, E-S-C-O-T-T,  
 22 versus Bar Chris, B-A-R capital C-H-R-I-S?

23 A. I've heard of the case, but it  
 24 was in an earlier time.

25 Q. Have you heard of a decision in

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1                   EDWARD NECARSULMER, III  
 2 Feit, F-E-I-T, versus Leasco, L-E-A-S-C-O, by  
 3 Judge Weinstein?  
 4                   A. No.  
 5                   Q. Have you heard that a decision  
 6 was rendered in the Worldcom litigation by Judge  
 7 Denise Cote, C-O-T-E, on the subject of due  
 8 diligence?  
 9                   A. Yes.  
 10                  Q. Have you read that decision?  
 11                  A. I have not.  
 12                  Q. Have you been told anything  
 13 about the contents of the decision?  
 14                  A. Only what I've read.  
 15                  Q. And what have you read?  
 16                  A. Just in terms of general press  
 17 coverage of the matter.  
 18                  Q. Do you know any principles that  
 19 she referred to in her opinion?  
 20                  A. No.  
 21                  Q. Would you agree with the general  
 22 proposition -- and, please, if you don't agree,  
 23 tell me -- that over the years the underwriter  
 24 has been regarded as a type of gatekeeper to the  
 25 capital marketplace?

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1                   EDWARD NECARSULMER, III  
 2 will certainly do -- are certainly important in  
 3 the process; but I don't believe that it's -- it  
 4 completely -- that it's generally recognized  
 5 that that is part of the underwriters'  
 6 responsibility.  
 7                  Q. Do you believe that in initial  
 8 public offerings underwriters are heavily relied  
 9 upon by the investing public?  
 10                 A. I do believe that.  
 11                 Q. Do you believe that's true  
 12 especially where the companies doing the IPOs  
 13 are experiencing rapid growth and change just  
 14 before the IPO?  
 15                 MR. GLUCKOW: Object to the form.  
 16                 You can answer.  
 17                 THE WITNESS: I don't think  
 18 there's any difference from your last  
 19 question. I think your last question  
 20 is true, I wouldn't modify it.  
 21 BY MR. LEWIS:  
 22                 Q. Okay.  
 23                 A. The first question is true,  
 24 excuse me.  
 25                 Q. Do you agree that the

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1                   EDWARD NECARSULMER, III  
 2 MR. GLUCKOW: Object to the form.  
 3 You can answer.  
 4 THE WITNESS: Yes.  
 5 BY MR. LEWIS:  
 6                 Q. You do agree with that?  
 7                 A. I do.  
 8                 Q. And would you agree that an  
 9 underwriter's reputation has helped small  
 10 companies gain access to capital markets?  
 11                 MR. GLUCKOW: Object to the form.  
 12                 You can answer.  
 13                 THE WITNESS: Yes.  
 14 BY MR. LEWIS:  
 15                 Q. Do you believe that it is true  
 16 that underwriters have been considered  
 17 responsible for assuring the accuracy of an  
 18 issuer's offering materials?  
 19                 A. I don't believe that to be true.  
 20                 Q. And can you tell me why?  
 21                 A. I think among -- let me make  
 22 sure I phrase this properly. I think among  
 23 sophisticated investors, it's well-known that  
 24 the company is, in fact, you know, the better  
 25 source about its business and that underwriters

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1                   EDWARD NECARSULMER, III  
 2 reasonableness of a due diligence investigation  
 3 varies with the factual circumstances of each  
 4 offering?  
 5                 A. I do.  
 6                 Q. To what extent do you believe  
 7 expense is a determinant in how thorough due  
 8 diligence should be?  
 9                 MR. GLUCKOW: Object to the form.  
 10                 You can answer.  
 11                 THE WITNESS: Virtually not at  
 12 all.  
 13 BY MR. LEWIS:  
 14                 Q. And why is that?  
 15                 A. I think people's reputation and  
 16 their relationship with their clients -- I'm  
 17 talking about from an underwriter's point of  
 18 view now -- is priceless and cost, just for  
 19 better or worse, was never an issue.  
 20                 Q. Now, do you believe that in the  
 21 securities industry the standards for due  
 22 diligence are more rigorous in an IPO than in a  
 23 follow-on offer?  
 24                 MR. GLUCKOW: Object to the form.  
 25                 You can answer.

14 (Pages 50 to 53)

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1           EDWARD NECARSULMER, III  
2           THE WITNESS: I have a difficult

3           -- I think your concept is correct, but  
4           I'm not sure rigorous -- I guess what  
5           I'm trying to say is since there is  
6           less information in the public domain,  
7           more work is traditionally done, but I  
8           think the standards are pretty much the  
9           same.

10          BY MR. LEWIS:

11          Q. So the standards are the same  
12          but the work is more rigorous in the IPO than in  
13          the follow-on offerings?

14          MR. GLUCKOW: Object to the  
15          form. Mischaracterizes the testimony.

16          You can answer.

17          THE WITNESS: What I'm trying to  
18          say -- maybe I didn't say it properly  
19          -- is that if you are working on the  
20          second, third, or fourth offering for a  
21          company, A, you are knowledgeable,  
22          assuming you have the same team in  
23          place or parts of the same team in  
24          place; and, B, the body of information  
25          has been organized and is more easily

1           EDWARD NECARSULMER, III  
2           generalize. I mean, Google, there were  
3           no secrets, yet I'm sure on some small  
4           companies there are secrets, or that  
5           may be the wrong way to phrase it, but  
6           information that is not as available.

7          BY MR. LEWIS:

8          Q. Would you disagree then that the  
9          standards for due diligence are higher than  
10         usual where a company going through an IPO is  
11         experiencing rapid growth and change?

12          MR. GLUCKOW: Objection to the  
13          form.

14          You can answer.

15          It's vague and ambiguous.

16          THE WITNESS: I don't think I can  
17          answer. I'm not unwilling to, I just  
18          don't think I can answer that. I don't  
19          think the standards -- you are faced  
20          with the same issue when you agree to  
21          commit your capital and your reputation  
22          to underwrite securities and there may  
23          be a number of, you know, intensity, or  
24          whatever the proper phrase would be,  
25          someplace within the same scale and I

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1           EDWARD NECARSULMER, III

2           -- easy to digest and to process. An  
3           IPO you tend -- sometimes have to  
4           really break new ground to get  
5           information.

6          BY MR. LEWIS:

7          Q. Would you agree that the  
8          securities industry as a whole expects more due  
9          diligence work in an IPO than in a follow-on  
10         offering?

11          MR. GLUCKOW: Object to the  
12          form. Vague and ambiguous.

13          You can answer.

14          THE WITNESS: I wouldn't agree to  
15          that.

16          BY MR. LEWIS:

17          Q. I think -- strike that.

18          Is it true in an IPO that  
19          because securities have not been previously  
20          publicly traded, information about an issuer  
21          is often not readily available to the public  
22          as a whole?

23          MR. GLUCKOW: Object to the form.

24          You can answer.

25          THE WITNESS: It's too hard to

1           EDWARD NECARSULMER, III  
2           don't think it's just because it's an  
3           initial public offering or just because  
4           it's a company that's a rapidly growing  
5           company.

6          BY MR. LEWIS:

7          Q. So in the past when you -- I  
8          take it you have performed -- you have  
9          participated in some way or other in due  
10         diligence investigations both of companies going  
11         through IPOs and companies going through  
12         follow-on offerings. Is that correct?

13          A. That is correct.

14          Q. And in those situations you did  
15          not expect the due diligence team to adjust its  
16          level of due diligence to take into account the  
17          newness of the one company versus the previous  
18          offering of the other?

19          MR. GLUCKOW: Object to the  
20          form. Mischaracterizes the testimony.

21          You can answer.

22          THE WITNESS: I don't think  
23          that's what I said, or if I did say  
24          that, that's not what I meant. What I  
25          meant was there are a whole set of

15 (Pages 54 to 57)

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Page 60

1           EDWARD NECARSULMER, III  
 2 variables. Some of the ones you've  
 3 mentioned are variables -- are valid  
 4 ones, but there are -- just the  
 5 existence of the fact that it was a  
 6 fast growing company or it was a new  
 7 company would not be enough for me to  
 8 direct the team to do something  
 9 different.

10 BY MR. LEWIS:

11 Q. What variables, if any, would  
 12 cause you to direct the team to do something  
 13 different in due diligence?

14 MR. GLUCKOW: I'm going to object  
 15 to the form and object on the ground  
 16 that it's vague and ambiguous and quite  
 17 overbroad.

18 But you can answer.

19 THE WITNESS: I mean it's a  
 20 situation-by-situation issue. I think  
 21 that -- and I can only, you know,  
 22 really respond to it anecdotally if I  
 23 can think of some appropriate  
 24 anecdotes. But I guess my point is,  
 25 without belaboring this, is you look at

1           EDWARD NECARSULMER, III  
 2 organized in terms of your ability to get  
 3 documents and things that were on point that  
 4 would go right to your organizational outline,  
 5 where if they hadn't, you might have to really  
 6 help them set up the process.

7 Q. Would you agree that in an  
 8 initial public offering there is a strong  
 9 affirmative duty of disclosure?

10 MR. GLUCKOW: Object to the  
 11 form. Vague and ambiguous. Calls for  
 12 a legal conclusion.

13 You can answer.

14 THE WITNESS: Yes.

15 BY MR. LEWIS:

16 Q. Would you agree that in  
 17 conducting due diligence it is necessary for the  
 18 due diligence team to continue its investigation  
 19 of the issuer up to and including the effective  
 20 date of the registration statement?

21 A. Yes.

22 Q. And a due diligence  
 23 investigation would be inadequate if the  
 24 underwriter did not do that?

25 MR. GLUCKOW: Object to the

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Page 61

1           EDWARD NECARSULMER, III  
 2 each situation and hopefully -- you  
 3 know, if you are managing the process,  
 4 you look at each situation and  
 5 hopefully you figure out, you know,  
 6 what you need to do to satisfy your  
 7 commitment committee, yourself, and the  
 8 marketplace. And there are really no  
 9 other rules specific -- you know,  
 10 templates I can honestly look at you  
 11 and offer beyond that.

12 BY MR. LEWIS:

13 Q. Have you ever had the experience  
 14 of adjusting the due diligence that you were  
 15 conducting on a company because the company had  
 16 management that had not had long experience in  
 17 running a public company?

18 A. Yes.

19 Q. And why did you do that?

20 A. Well, because simply as a matter  
 21 of mechanics. In many cases if a company had  
 22 done other offerings or was -- let's say had  
 23 done other offerings or had significant -- had  
 24 done private equity financings or other  
 25 transactions, typically they might be more

1           EDWARD NECARSULMER, III  
 2 form. It calls for a legal conclusion.  
 3 You can answer.

4 THE WITNESS: I mean, the easy  
 5 answer is yes, but -- well, okay, let  
 6 me just leave it at yes.

7 BY MR. LEWIS:

8 Q. Is it your understanding as a  
 9 non-lawyer that one of the duties of  
 10 underwriters is to deal fairly with the  
 11 investing public?

12 MR. GLUCKOW: Object to the form.

13 You can answer.

14 THE WITNESS: Absolutely.

15 BY MR. LEWIS:

16 Q. Isn't that sometimes referred to  
 17 as the shingle theory?

18 A. I'm not familiar with that.

19 Q. I take it from your initial  
 20 report that one of your beliefs is that an  
 21 underwriter has an obligation to conduct a  
 22 reasonable investigation in an IPO?

23 A. Yes.

24 Q. And there is a long tradition  
 25 since the securities laws were enacted in the

16 (Pages 58 to 61)

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1 EDWARD NECARSULMER, III  
 2 '30s of underwriters conducting due diligence  
 3 investigations?

4 MR. GLUCKOW: Object to the  
 5 form. Vague and ambiguous.

6 You can answer.

7 THE WITNESS: Yes.

8 BY MR. LEWIS:

9 Q. To your knowledge, how far back  
 10 in time have due diligence investigations been  
 11 conducted by underwriters?

12 A. I think they were formalized by  
 13 the 33 Act, but I don't go back quite that far,  
 14 but it's certainly my understanding that  
 15 particularly, you know, throughout history, you  
 16 know, you committed your own capital to a  
 17 greater extent I think than -- now things come  
 18 full cycle, but in the beginning I think people  
 19 did due diligence as, you know -- it's my  
 20 understanding that a lot of due diligence --  
 21 what due diligence was done was, in fact, you  
 22 know, a matter of, you know, of self-protection  
 23 as opposed to any responsibility -- as opposed  
 24 to exclusively a responsibility to, you know,  
 25 investors.

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1 EDWARD NECARSULMER, III  
 2 underwriter has taken an even larger  
 3 responsibility or has been delegated --  
 4 I don't like the word delegated, but  
 5 has been delegated a responsibility by  
 6 the other comanagers to a greater  
 7 extent.

8 And the other -- if I can just  
 9 illuminate. The process has gotten  
 10 better to the extent that investment  
 11 banks began to specialize in either  
 12 certain industries or had groups that  
 13 did certain industries; whereas, in my  
 14 life, everybody was a generalist and so  
 15 that if you were doing a  
 16 telecommunications deal, it would be  
 17 done by the telecommunications group in  
 18 Lehman Brothers or Goldman Sachs or  
 19 something, who really became quite  
 20 expert.

21 I know we had a significant  
 22 technology practice and management  
 23 would often tell me that some of the  
 24 people in that group are as  
 25 knowledgeable -- not as they were, of

Page 63

Page 65

1 EDWARD NECARSULMER, III

2 Q. Did your work in the securities  
 3 industry begin in 1967 with Hallgarten?

4 A. Correct.

5 Q. In the time that you've been in  
 6 the industry, have you become aware of any  
 7 changes in practical standards for due diligence  
 8 investigations?

9 MR. GLUCKOW: Objection. Vague  
 10 and ambiguous. Overbroad.

11 You can answer.

12 BY MR. LEWIS:

13 Q. Let me reframe the question.

14 Have you become aware of  
 15 changes in practice with respect to due  
 16 diligence investigations over the time since  
 17 1967 that you've been employed in the  
 18 industry?

19 MR. GLUCKOW: The same objection.  
 20 You can answer.

21 THE WITNESS: None to the basic  
 22 tenets of how the business or the  
 23 process is done. I think one of the  
 24 main changes that I've seen is that to  
 25 the extent that the managing

1 EDWARD NECARSULMER, III  
 2 course, but as their competitors were  
 3 about the business.

4 MR. GLUCKOW: I think we've been  
 5 going a little bit over an hour. If  
 6 there's a point in your outline where  
 7 we could take a short break.

8 MR. LEWIS: We can take it right  
 9 now.

10 MR. GLUCKOW: That would be  
 11 great.

12 (A recess was had from 1:18 p.m.  
 13 to 1:26 p.m.; and then the proceedings  
 14 continued as follows:)

15 BY MR. LEWIS:

16 Q. Mr. Necarsulmer, outside of this  
 17 litigation, before you did your work in this  
 18 case, did you ever hear it said that  
 19 underwriters were required to act as a prudent  
 20 man would in the management of his own property?

21 MR. GLUCKOW: Those words?

22 MR. LEWIS: Yes.

23 THE WITNESS: I've certainly  
 24 heard of the prudent man rule, but I  
 25 thought it referred to trust companies

17 (Pages 62 to 65)

Page 66	Page 68
1                   EDWARD NECARSULMER, III 2 and mutual funds. 3 BY MR. LEWIS: 4     Q. Okay. Have you heard anything 5 else said about whether underwriters had to act 6 as a prudent man in the management of his own 7 property? 8     A. I've never heard that. 9     Q. Do you believe that underwriters 10 are entitled to rely solely on the 11 representations of a company's officers or 12 counsel? 13    MR. GLUCKOW: Object to the form. 14    You can answer. 15    THE WITNESS: No. 16 BY MR. LEWIS: 17    Q. And why do you not believe that they can do so? 18    A. In my experience, when possible, 20 and when relevant, it always -- it wasn't always 21 the case. If there are independent checks, you 22 can do formal or informal, it's a useful part of 23 the process. 24    Q. Do you believe that verification 25 of information is a critical step in the due	1                   EDWARD NECARSULMER, III 2 verification? 3     MR. LEWIS: Yes. 4 BY MR. LEWIS: 5     Q. And is it your belief that on 6 rare occasions statements may be made by company 7 officers to induce an underwriter to underwrite 8 an offering where those statements are 9 deliberately false? 10    MR. GLUCKOW: Objection to the 11 form. Vague and ambiguous. 12    You can answer. 13    THE WITNESS: It certainly has 14 happened. 15 BY MR. LEWIS: 16    Q. Can you think of any situations 17 where it has happened? 18    MR. GLUCKOW: In his own 19 experience? 20 BY MR. LEWIS: 21    Q. Either in your own experience or 22 those you have heard of? 23    A. I can't give you a specific example. 25    Q. Do you agree with the

Page 67	Page 69
1                   EDWARD NECARSULMER, III 2 diligence process? 3     A. Yes. 4     Q. And do you believe that that is 5 necessary because even honest clients can make 6 mistakes? 7     MR. GLUCKOW: Objection to the 8 form. 9     You can answer. 10 BY MR. LEWIS: 11    Q. Do you believe that one reason that verification is necessary is because even 13 honest clients can make mistakes? 14    MR. GLUCKOW: Same objection. 15    You can answer. 16    THE WITNESS: Yes. I don't 17 enthusiastically agree, but I will 18 concede that. 19 BY MR. LEWIS: 20    Q. Okay. Do you agree that another reason that it may be necessary is because 22 honest clients can be overenthusiastic or overoptimistic? 23    A. Yes. 25    MR. GLUCKOW: The "it" being	1                   EDWARD NECARSULMER, III 2 proposition that underwriters must be alert to 3 exaggerations by an issuer? 4     MR. GLUCKOW: Objection to the form 5 and object to the ground that like 6 these other questions, that it's vague 7 and ambiguous and overbroad. 8     But you can answer. 9     THE WITNESS: Yes. 10 BY MR. LEWIS: 11    Q. Now, do you believe that there are any industry standards relating to 13 verification of information supplied by an issuer? 15    A. No. 16    MR. GLUCKOW: I offer a belated 17 objection to the form. 18 BY MR. LEWIS: 19    Q. Have there been instances in your career where to verify information you or 21 people working for you interviewed lower level 22 employees of a corporation? 23    A. I can't answer that yes or no. 24    I've seen it done, not in a verification sense, but if I may, for example, in a business where

<p>1                   EDWARD NECARSULMER, III      2 one particular product line, geographic line,      3 factory is critical or critical to driving      4 growth of sales and revenues, I've seen it done      5 where you've asked to be exposed to the actual      6 hands-on people in that area, but it's not      7 customary, except for, again, you might meet a      8 plant manager if you go look at a facility, that      9 kind of thing, but he would more be a tour guide      10 and you would generally speak to the designated      11 heads of marketing, finance, manufacturing,      12 whatever the traditional department heads of the      13 company are. That's certainly my experience.</p> <p>14       Q. In the instances you gave of      15 dealing with lower level employees, would it be      16 fair to say you were giving examples of      17 situations where the contacts were made for      18 evaluation of those people or examination of      19 facilities?</p> <p>20       MR. GLUCKOW: Objection to the      21 form.</p> <p>22       You can answer.</p> <p>23       THE WITNESS: The latter, not the      24 former.</p> <p>25       BY MR. LEWIS:</p>	<p>1                   EDWARD NECARSULMER, III      2 manufacturing process or something? Typically      3 not. So oil and gas is the usual example      4 where you get your independent petroleum      5 engineer to verify reserves, or something like      6 that.</p> <p>7       Q. Do you believe that there are      8 instances in which verification may require      9 reviewing internal documents of a company that      10 the company has not voluntarily supplied?</p> <p>11       MR. GLUCKOW: Object to the form.      12 You can answer.</p> <p>13       THE WITNESS: I'm not really      14 comfortable with the hypothetical. I'm      15 sure there are situations, I just have      16 never run into one.</p> <p>17       BY MR. LEWIS:</p> <p>18       Q. Do you believe that it's true      19 that during the due diligence process the      20 positions of the underwriters and the company's      21 officers should become somewhat adverse?</p> <p>22       MR. GLUCKOW: Object to the form.      23 You can answer.</p> <p>24       THE WITNESS: In an ideal world      25 there ought to be a nice balance</p>
<p>1                   EDWARD NECARSULMER, III      2 Q. Okay. But not as a verification      3 on information that had been supplied by      4 management?</p> <p>5       A. Correct.</p> <p>6       Q. Have there been instances in      7 your career when either in participating in or      8 conducting a due diligence investigation you      9 asked a company to give you access to files that      10 they had not provided to you?</p> <p>11       A. I don't recall ever having done      12 that.</p> <p>13       Q. Do you believe that use of      14 industry experts in due diligence is a desirable      15 thing in general terms?</p> <p>16       A. Yes, with a qualification. I      17 think it's important to -- I think it's      18 important when there's something you don't      19 understand -- or, again, I'm a practical      20 character, so I can remember working on an      21 insurance company deal where there's no way we      22 would be able to understand actuarial      23 assumptions, so we would hire our own actuary.</p> <p>24       But would I encourage the use      25 of an outside expert to look at somebody's</p>	<p>1                   EDWARD NECARSULMER, III      2 between friendly or, you know,      3 cooperation, but you still need to have      4 the ability to get the answers, and if      5 that causes adversity, so be it.</p> <p>6       BY MR. LEWIS:</p> <p>7       Q. But would you agree that the due      8 diligence process often fosters a collaborative      9 atmosphere between the issuer and the      10 underwriters?</p> <p>11       A. It certainly always starts out      12 that way. Or I should rephrase, usually starts      13 out that way.</p> <p>14       Q. In fact, in your report in the      15 AMF case --</p> <p>16       A. Mm-hmm.</p> <p>17       Q. -- Exhibit 324, Page 2,      18 Paragraph B --</p> <p>19       MR. GLUCKOW: Hold on; just let      20 us get there.</p> <p>21       Okay.</p> <p>22       BY MR. LEWIS:</p> <p>23       Q. -- the last sentence, you      24 wrote: "While the process often fosters a      25 collaborative atmosphere between issuer and</p>

<p>1                   EDWARD NECARSULMER, III 2 underwriters, it is essential for due diligence 3 efforts to be thorough and their conclusions 4 factually supportable."</p> <p>5                   Do you believe that as a 6 general proposition?</p> <p>7                   A. I think that's just what I just 8 said, but, yes.</p> <p>9                   Q. Is there a reason that in 10 writing your report in this case you took out 11 the reference to the fostering of a 12 collaborative atmosphere?</p> <p>13                  A. No. I said to you before that I 14 used this as a template, but it was more in the 15 process of ordering things and what I wanted to 16 cover, but I frankly rethought what I would want 17 to include in my opinion.</p> <p>18                  MR. GLUCKOW: By the way, for the 19 record, you are comparing B of 324 with 20 B of 321?</p> <p>21                  MR. LEWIS: Yes.</p> <p>22                  MR. GLUCKOW: And comparing 23 collaborative versus cooperation?</p> <p>24                  MR. LEWIS: Right.</p> <p>25                  MR. GLUCKOW: Okay.</p>	<p>Page 74</p> <p>1                   EDWARD NECARSULMER, III 2 care in their investigations?</p> <p>3                   A. I certainly do.</p> <p>4                   Q. Do you agree that the 5 underwriters must independently verify the 6 company's representations?</p> <p>7                   MR. GLUCKOW: Objection to the 8 form. Asked and answered.</p> <p>9                   You can answer.</p> <p>10                  THE WITNESS: I don't think all 11 of the representations. I think -- you 12 know, the basic description of their 13 business and their business plan and 14 these kinds of things are -- if you are 15 going to do business with these people, 16 you traditionally accept those at face 17 value.</p> <p>18                  BY MR. LEWIS:</p> <p>19                  Q. Do you believe that in each case 20 in which an underwriter conducts due diligence 21 it must conduct a meaningful investigation of 22 the company?</p> <p>23                  MR. GLUCKOW: Objection to the 24 form.</p> <p>25                  You can answer.</p>
<p>1                   EDWARD NECARSULMER, III 2 BY MR. LEWIS:</p> <p>3                  Q. In your report in 321 you have 4 written: "While the process requires 5 cooperation between issuer and underwriters, it 6 is essential for due diligence efforts to be 7 thorough and their conclusions factually 8 supportable."</p> <p>9                  I don't have a question, but if 10 you want to respond, you are free.</p> <p>11                  MR. GLUCKOW: Wait for a 12 question.</p> <p>13 BY MR. LEWIS:</p> <p>14                  Q. Do you believe that in the due 15 diligence process the underwriters are 16 frequently required to play devil's advocate?</p> <p>17                  A. Yes.</p> <p>18                  Q. When, in your opinion, does that 19 become necessary?</p> <p>20                  A. It's hard to be specific. I 21 mean, it could be from the first meeting to the 22 bringdown call right before you price. I mean, 23 it's just part of the ongoing process.</p> <p>24                  Q. Do you agree in principle that 25 the underwriters must employ a high degree of</p>	<p>Page 75</p> <p>1                   EDWARD NECARSULMER, III 2 THE WITNESS: I agree with that.</p> <p>3 BY MR. LEWIS:</p> <p>4                  Q. Would you agree that in the due 5 diligence context the term investigation can be 6 defined as conducting a searching inquiry?</p> <p>7                  A. I don't really have a response 8 to that. I think that's a matter of semantics. 9 I think you -- whatever procedure and process 10 you use and you feel is adequate and reasonable, 11 you do.</p> <p>12                  Q. Is there a definition that you 13 have in your own mind for what an investigation, 14 a due diligence investigation, means?</p> <p>15                  A. Yes, but it can vary from 16 company to company and project to project.</p> <p>17                  Q. Would you agree that to 18 investigate means to inquire into a subject 19 matter with attention to detail?</p> <p>20                  A. That's a fair definition.</p> <p>21                  Q. That's a...?</p> <p>22                  A. Fair definition.</p> <p>23                  Q. Fair definition?</p> <p>24                  MR. GLUCKOW: Delayed objection 25 to the form.</p>

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1           EDWARD NECARSULMER, III  
 2 You can answer. And you have.

3 BY MR. LEWIS:

4 Q. Is it your view that if an  
 5 underwriter receives negative information from a  
 6 company of some sort, it's required -- it  
 7 becomes necessary to follow up on that  
 8 information?

9           MR. GLUCKOW: Objection to the  
 10 form. Vague and ambiguous.

11 You can answer.

12           THE WITNESS: I think it's  
 13 necessary to follow up on all  
 14 information - negative, positive, or  
 15 sideways.

16 BY MR. LEWIS:

17 Q. And noninformation, also?

18           MR. GLUCKOW: Objection to the  
 19 form.

20 You can answer.

21           THE WITNESS: If something is  
 22 self-evident or that's just a fact, no,  
 23 you don't need to follow up on it,  
 24 but...

25 BY MR. LEWIS:

1           EDWARD NECARSULMER, III  
 2 not -- it's not the final answer.

3 BY MR. LEWIS:

4 Q. Have you been involved in due  
 5 diligence investigations where a great amount of  
 6 time and money was spent in the investigation  
 7 and the investigation was not to your  
 8 satisfaction?

9 A. Yes.

10 Q. And can you give any anecdotal  
 11 examples of that?

12 A. Well, all I can tell you is I  
 13 have been in situations where, either as a  
 14 commitment committee or as just a man heading up  
 15 a department, I didn't feel we had adequate  
 16 information to -- either in one specific area or  
 17 in general or that we had gone far enough to  
 18 sign off on underwriting the or presenting it to  
 19 whoever needed to sign off on it, so the answer  
 20 is yes.

21 Q. What did you do in that instance  
 22 or instances?

23 A. You go back and you do more  
 24 work.

25 Q. Did you ever hold up an offering

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1           EDWARD NECARSULMER, III

2 Q. Do you use the term red flags in  
 3 your work?

4 A. Yes.

5 Q. How do you use that term?

6 A. To define issues that either  
 7 require further attention or are not -- or  
 8 perhaps inconsistent with what we -- our, you  
 9 know, prior impression would be.

10 Q. Is it your opinion that it is  
 11 necessary for an underwriter to follow up on any  
 12 red flag that suggests that a registration  
 13 statement may not be complete and accurate?

14 A. I mean, the general answer to  
 15 the question is yes, but it's very hard just to  
 16 -- let me leave it there. Yes.

17 Q. Would you agree that merely  
 18 spending a lot of time on an investigation,  
 19 meeting a lot of times with management, and  
 20 reviewing a lot of documents is not necessarily  
 21 sufficient in a due diligence investigation?

22           MR. GLUCKOW: Vague and  
 23 ambiguous.

24 You can answer.

25 THE WITNESS: It doesn't -- it's

1           EDWARD NECARSULMER, III

2 to do more work?

3 A. Yes.

4 Q. How recently was that, in  
 5 general?

6 A. I would say that would have been  
 7 pre-1998.

8 Q. Do you have an opinion on  
 9 whether that portion of the due diligence  
 10 investigation which the underwriters in this  
 11 case did with respect to possible gray marketing  
 12 or Costco distribution of Adams products  
 13 satisfied industry standards?

14           MR. GLUCKOW: Objection to the  
 15 form. Vague and ambiguous. The report  
 16 speaks for itself.

17 You can answer.

18           THE WITNESS: I believe it does.

19 BY MR. LEWIS:

20 Q. So you do in fact believe that  
 21 the underwriters in this case did investigate  
 22 possible gray marketing or Costco distribution  
 23 of Adams products?

24 A. I believe that underwriters were  
 25 aware of the situation, made a judgment about

21 (Pages 78 to 81)

1           EDWARD NECARSULMER, III  
 2 how impactful it was upon the company, and acted  
 3 accordingly.

4           Q. And the opinion you have on that  
 5 subject is based, as is your overall opinion, on  
 6 industry standards rather than legal standards?

7           MR. GLUCKOW: Objection to the  
 8 form.

9           You can answer.

10          THE WITNESS: Yes.

11          BY MR. LEWIS:

12          Q. You are not relying on any cases  
 13 with respect to that?

14          A. Right.

15          Q. It's your observation of  
 16 industry norms?

17          A. Correct.

18          Q. Do you know of any investigation  
 19 that the underwriters conducted of gray  
 20 marketing or Costco issues other than what is  
 21 reflected in the writings that you have listed  
 22 in the attachment to your report?

23          MR. GLUCKOW: Objection to the form.

24          You are referring to Exhibit A to  
 25 321?

1           EDWARD NECARSULMER, III  
 2 BY MR. LEWIS:  
 3           Q. Based on your experience in the  
 4 industry, is it customary to record in writing  
 5 any significant activities you undertake as part  
 6 of a due diligence investigation?

7           MR. GLUCKOW: Objection to the  
 8 form. Vague and ambiguous.

9           You can answer.

10          THE WITNESS: Customary but not  
 11 exclusive.

12          BY MR. LEWIS:

13          Q. Can you explain what you mean by  
 14 that?

15          A. What I mean by that is that you  
 16 obviously want to write down and memorialize as  
 17 much as you possibly can, but this is a process  
 18 and you go out and you talk to people and you  
 19 are working with the CFO and you are talking  
 20 about an issue and you are -- you know, there  
 21 are things that you hope that the people on your  
 22 team are getting a feel for and digesting about  
 23 the company, and whether that all gets written  
 24 down or not, I can't tell you.

25          Q. Is it customary in your

1           EDWARD NECARSULMER, III  
 2 MR. LEWIS: 321.

3           MR. GLUCKOW: Exhibit B?

4           MR. LEWIS: Exhibit B.

5           THE WITNESS: Those were the  
 6 materials that I reviewed, solely and  
 7 completely.

8          BY MR. LEWIS:

9          Q. Do you believe that the best  
 10 record of what actions the underwriters take in  
 11 a due diligence investigation is what they  
 12 preserve in writing?

13          MR. GLUCKOW: Objection to the  
 14 form. Vague and ambiguous.

15           You can answer.

16          THE WITNESS: I don't know how to  
 17 answer the question.

18          The written record is certainly,  
 19 you know, significant in the part that  
 20 lasts, but when you sit in a commitment  
 21 committee or when you sit with your  
 22 boss and you say, you know, these are  
 23 important issues, that could be equally  
 24 important, but certainly the only thing  
 25 I can refer to is what I've seen.

1           EDWARD NECARSULMER, III  
 2 experience for an underwriter to document  
 3 discussions regarding determinations of  
 4 materiality?

5           MR. GLUCKOW: Objection to the  
 6 form. Vague and ambiguous.

7           You can answer.

8          THE WITNESS: I would say no.

9          BY MR. LEWIS:

10          Q. Why is that?

11          A. Because if, you know, again, you  
 12 are determining something is not material, you  
 13 probably move on.

14          Q. In your experience, is it  
 15 customary to document information which leads to  
 16 the decision to exclude something from a  
 17 prospectus?

18          MR. GLUCKOW: Objection to the  
 19 form. Vague and ambiguous.

20           You can answer.

21          THE WITNESS: I'll answer again  
 22 no.

23          BY MR. LEWIS:

24          Q. Now, is it customary in the  
 25 industry to keep notes regarding a due diligence

<p style="text-align: right;">Page 86</p> <p>1           EDWARD NECARSULMER, III      2 investigation, in your experience?      3       A. Again, customary but not      4 exhaustive. I mean, anecdotally, you -- someone      5 tells you you have currency exposure to some      6 kind of currency, so you investigate and you      7 find out that in fact the contracts are written      8 in dollars -- I mean, I'm making this -- I'm      9 using an example -- so therefore I would never      10 expect for someone to write down, gee, I checked      11 out whether we were exposed to the Zambian      12 kwacha and found out the contracts were written      13 in dollars. Because we had already reviewed the      14 contracts or we had the contracts as another      15 part of our thing, I wouldn't have expected that      16 to be a separate analysis or separate record.      17       Q. Is it your opinion that it is      18 desirable for an underwriter to prepare a list      19 of facts to be verified and then to address them      20 in a systematic fashion?      21       A. Desirable? Absolutely.      22       Q. What do you believe, as you sit      23 here and as you can recall, that the      24 underwriters did to investigate possible gray      25 marketing or Costco distribution of Adams</p>	<p style="text-align: right;">Page 88</p> <p>1           EDWARD NECARSULMER, III      2 Costco distribution of Adams products?      3       MR. GLUCKOW: Objection to the      4 form.      5           You can answer.      6       THE WITNESS: They did a number      7 of things. They spent time with the      8 marketing people at Adams and the      9 subject was discussed. They      10 participated in the customer survey      11 process where that was, to the best of      12 my recollection, never mentioned as an      13 issue by a group of their -- a group of      14 customers.      15       BY MR. LEWIS:      16       Q. Anything else that you can      17 recall?      18       A. Those would be the two main      19 things that I can recall at this time.      20       Q. Incidentally, maybe I can      21 short-circuit some paper, you referred in your      22 rebuttal report to a number of specific pages at      23 Pages 1 and 2 of the rebuttal report --      24       A. Mm-hmm.      25       Q. -- under underwriting document</p>
<p style="text-align: right;">Page 87</p> <p>1           EDWARD NECARSULMER, III      2 products?      3       MR. GLUCKOW: Objection to the      4 form. Overbroad.      5           In addition to what's in his      6 reports or in summarized reports?      7       BY MR. LEWIS:      8       Q. As you sit here, can you recall      9 anything that Adams did to investigate possible      10 gray marketing or Costco distribution of Adams      11 products? And if you need to refer --      12       THE WITNESS: May I ask a      13 question?      14       MR. GLUCKOW: Let me object to      15 the form. I think you said what did      16 Adams do.      17       THE WITNESS: Yeah, that's what I      18 was going to ask.      19       MR. GLUCKOW: Do you want to have      20 it read back or fix it?      21       MR. LEWIS: I'll fix it.      22       BY MR. LEWIS:      23       Q. As you sit here, can you recall      24 anything that the underwriters did to      25 investigate possible gray market distribution or</p>	<p style="text-align: right;">Page 89</p> <p>1           EDWARD NECARSULMER, III      2 pages, Paragraph B, Paragraph C.      3           Am I correct that none of those      4 pages specifically referred to the terms gray      5 marketing or Costco?      6       MR. GLUCKOW: You mean the UND      7 document production pages as opposed to      8 the deposition transcripts?      9       MR. LEWIS: Yes, correct.      10       THE WITNESS: I don't recall. I      11 can't tell you what said what. I know      12 they were both used and -- I can      13 certainly tell you in the deposition      14 transcripts it came up often. I just      15 don't recall.      16       MR. LEWIS: Okay, if we may go      17 through them.      18       BY MR. LEWIS:      19       Q. Are you seeking to be qualified      20 in this case as an expert on the subject of what      21 disclosures were legally required?      22       MR. GLUCKOW: Objection to the      23 form.      24           You can answer.      25       THE WITNESS: To the extent that</p>

<p>1                   EDWARD NECARSULMER, III      2 it's part of the due diligence      3 assignment, I guess the answer is yes,      4 but I wasn't specifically -- to the      5 best of my knowledge, I'm not      6 specifically trying to get there. I      7 think that it's all basically the same      8 issue to the investigation and I'm sure      9 that it was properly disclosed.</p> <p>10 BY MR. LEWIS:      11 Q. But you say in your rebuttal      12 report that the defendants made a reasonable      13 judgment on disclosure?</p> <p>14 MR. GLUCKOW: Where are you      15 referring?      16 MR. LEWIS: The rebuttal report.      17 MR. GLUCKOW: What page? What      18 paragraph?      19 MR. LEWIS: Let's go to Paragraph      20 C. "After doing proper due diligence,      21 the underwriters made a reasonable      22 judgment related to disclosure of this      23 issue."      24 MR. GLUCKOW: Maybe we are on      25 different pages. I'm not finding what</p>	<p>1                   EDWARD NECARSULMER, III      2 channels --      3 Q. Okay.      4 A. -- and then the dealers would be      5 responsible for the cars. And one of the issues      6 was dealer relations and, you know, the whole --      7 how the US network hung together. So I      8 certainly was, you know, involved in that      9 particular case, and, you know, we determined      10 that it wasn't material to what we were doing,      11 but it was out there.      12 I can't think of others, but I      13 suspect there have been others.      14 Q. When was that Daimler-Benz      15 matter?      16 A. I guess that was a '93      17 offering. There were two or three, the rights      18 offering and an equity offering and all around      19 the -- that offering all around the same time.      20 I just remember it being brought up and us      21 discussing it and then doing a little research      22 on it at the time.      23 Q. Well, is it your testimony that      24 if in this case there was in fact a serious gray      25 marketing issue and the underwriters did not</p>
<p>1                   EDWARD NECARSULMER, III      2 you are referring to. 322, what      3 paragraph?      4 MR. LEWIS: 3.      5 MR. GLUCKOW: Oh, he said C.      6 THE WITNESS: I thought you said      7 C, I'm sorry.</p> <p>8 BY MR. LEWIS:      9 Q. Let me read it in full: "To the      10 extent that either expert is opining that the      11 underwriters were unreasonable in concluding      12 that a disclosure regarding gray marketing was      13 not necessary, I disagree with that contention      14 and believe, that after doing proper due      15 diligence, the underwriters made a reasonable      16 judgment related to disclosure of this issue."</p> <p>17 You do not contend, do you,      18 that you are an expert in gray markets?</p> <p>19 A. Absolutely not.</p> <p>20 Q. Did you ever have experience      21 with gray market issues before this litigation?</p> <p>22 A. I actually did once. I worked      23 on a significant case for Daimler-Benz, and it      24 was -- one of the issues they were facing was      25 importation of cars not through their regular</p>	<p>1                   EDWARD NECARSULMER, III      2 detect it, they are excused for overlooking it?      3 MR. GLUCKOW: Objection to the      4 form. It assumes facts not in      5 evidence. It calls for speculation and      6 an incomplete hypothetical. Overbroad.      7 THE WITNESS: I'd be happy to try      8 to answer your question, I'm just not      9 sure I can.</p> <p>10 BY MR. LEWIS:      11 Q. Well, let's take the      12 hypothetical assumption that -- not so      13 hypothetical -- that there was a serious      14 potential problem that existed, that the      15 underwriters conducted the investigation -- let      16 me reframe it.      17 Are you saying anything by your      18 opinion other than if the underwriters did a      19 diligent investigation, they were not required      20 to disclose something they didn't find?</p> <p>21 MR. GLUCKOW: The same objections.      22 THE WITNESS: I fundamentally      23 agree with that, yes.</p> <p>24 BY MR. LEWIS:      25 Q. Your opinion does not rest on</p>